

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FIRSTENERGY GENERATION, LLC,
a wholly owned subsidiary of FirstEnergy Corporation,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner

FILED
Aug 19, 2019
DEBORAH S. HUNT, Clerk

Nos. 18-1654,
18-1782

JUDGMENT ENFORCING IN PART AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

Before: SUHRHEINRICH, BUSH, and READLER, Circuit Judges.

THIS CAUSE came to be heard upon a petition filed by FirstEnergy Generation, LLC for review of an Order of the National Labor Relations Board issued May 16, 2018, in Board Case Nos. 06-CA-163303 and 06-CA-170901, reported at 366 NLRB No. 87 (2018), and upon a cross-petition filed by the National Labor Relations Board for enforcement of said Order. The Court heard argument of the parties and has considered the briefs and transcript of record filed in this cause. On July 2, 2019, the Court, being fully advised in the premises, handed down its opinion granting in part the petition of FirstEnergy Generation, LLC and granting in part the Board's cross-petition for enforcement. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Sixth Circuit that FirstEnergy Generation, LLC, a wholly owned subsidiary of FirstEnergy Corporation, its officers, agents, successors, and assigns, shall abide by said order as modified by the Court. (See attached Order and Appendix).

FOR THE COURT:



NATIONAL LABOR RELATIONS BOARD

v.

FIRSTENERGY GENERATION, LLC,
a wholly owned subsidiary of FirstEnergy Corp.

ORDER

FirstEnergy Generation, LLC, a wholly owned subsidiary of FirstEnergy Corp., Shippingport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Failing and refusing to bargain with the International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union) as the designated collective-bargaining representative of the following bargaining unit of employees by unilaterally changing wages, hours, or other terms and conditions of employment of bargaining unit employees:

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

- (b) Unilaterally implementing provisions from the Respondent's Second Comprehensive Offer of Settlement dated September 17, 2015, that were inconsistent with its final, preimpasse offer made to the Union by eliminating "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials, in addition to the HSA and 401(k) payments.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request,

bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth above.

- (b) Upon request by the Union, and at the Union's option, either reinstitute the "in-the-box" retiree health benefits or implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments (while retaining HSA and 401(k) payments previously made), in accordance with the Respondent's Second Comprehensive Offer of Settlement dated September 17, 2015. In either case, the reinstitution of the "in-the-box" retiree benefits or the implementation of the additional wage increases, equity adjustments, and shift differentials shall be retroactive to the date the Respondent eliminated the "in-the-box" retiree health benefits.
- (c) Make all bargaining unit employees and former bargaining unit employees whole, with interest, for their losses resulting from either the Respondent's elimination of the "in-the-box" retiree health benefits or its failure to implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments, depending on which option the Union selects in paragraph 2(b) above.¹
- (d) Compensate affected bargaining unit employees and former bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.
- (e) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional

¹ In the event the Union opts to have the Respondent reinstitute the "in-the-box" retiree health benefits, at the compliance stage the Respondent may litigate whether any particular employee's losses resulting from the elimination of those benefits should be offset by any HSA or 401(k) payments the Respondent previously made for the benefit of that employee. See *Active Transportation Co.*, 340 NLRB 426, 426 fn. 2 (2003) (the Board permits the employer to litigate at compliance whether back payments to union funds should be offset by what it spent to provide employer-sponsored benefits), *enfd.* 112 Fed.Appx. 60 (D.C. Cir. 2004).

Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with their employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time since October 27, 2015.

- (f) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

**POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES
COURT OF APPEALS ENFORCING IN PART AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with the International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union) as the designated collective-bargaining representative of the following bargaining unit of employees by changing wages, hours, or other terms and conditions of employment of bargaining unit employees, without first notifying the Union and giving it an opportunity to bargain about such changes.

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

WE WILL NOT unilaterally implement provisions from our Second Comprehensive Offer of Settlement dated September 17, 2015, that are inconsistent with our final, pre-impasse offer made to the Union by eliminating “in-the-box” retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes to your wages, hours, or other terms and conditions of employment notify, and on request, bargain with the Union as

the exclusive collective-bargaining representative of employees in the bargaining unit set forth above.

WE WILL, upon request by the Union, and at the Union's option, either reinstitute the "in-the-box" retiree health benefits or implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments (while retaining HSA and 401(k) payments previously made), in accordance with our Second Comprehensive Offer of Settlement dated September 17, 2015. In either case, the reinstitution of the "in-the-box" retiree benefits or the implementation of the additional wage increases, equity adjustments, and shift differentials shall be retroactive to the date we eliminated the "in-the-box" retiree health benefits.

WE WILL make all bargaining unit employees and former bargaining unit employees whole, with interest, for their losses resulting from either our elimination of the "in-the-box" retiree health benefits or our failure to implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments, depending on which option the Union selects in the paragraph above.

WE WILL compensate you for any adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

FIRSTENERGY GENERATION, LLC
A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP.